

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter, on the Commission's own motion, to)
investigate and to implement, if necessary, a batch)
cut migration process.)
_____)

Case No. U-13891

At the June 29, 2004 meeting of the Michigan Public Service Commission in Lansing,
Michigan.

PRESENT: Hon. J. Peter Lark, Chair
Hon. Robert B. Nelson, Commissioner
Hon. Laura Chappelle, Commissioner

ORDER ESTABLISHING BATCH CUT MIGRATION PROCESS

On February 20, 2003, the Federal Communications Commission (FCC) announced that it was adopting rules in its Triennial Review proceeding¹ regarding how incumbent local exchange carriers (ILECs) meet their statutory obligations to make unbundled network elements (UNEs) available to new entrants.

In an order issued on May 28, 2003 in Case No. U-13796, the Commission commenced a proceeding to facilitate the implementation of the FCC's anticipated Triennial Review Order (TRO). In so doing, the Commission requested comments on certain specific issues.

¹Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147.

On August 21, 2003, the FCC released the text of its TRO, which was published in the Federal Register on September 2, 2003 and which became effective on October 2, 2003. Among other things, the TRO required state commissions to approve, within nine months of the effective date of the TRO, or by July 2, 2004, a batch cut migration process² to be implemented by ILECs to address the costs and timeliness of the batch cut process. Alternatively, state commissions were directed to make detailed findings explaining why such a process would not be necessary in a particular market. On August 26, 2003, the Commission sought comments on the TRO implementation, including the batch cut migration process.

As an initial matter, the TRO directed that state commissions should adopt a batch cut-over “increment” for migrating customers served by unbundled loops combined with unbundled local circuit switching to unbundled stand-alone loops. In other words, states were to decide the appropriate volume of loops that should be included in the “batch.” In conjunction with ILECs and competitive local exchange carriers (CLECs), states were required to approve specific processes to be employed when performing a batch cut. The FCC anticipated that the processes to be adopted would vary based on the relevant ILEC’s particular network design and cut-over practices. However, the FCC expected that these processes would result in efficiencies associated with performing tasks once for multiple lines that would otherwise have to be performed on a line-by-line basis.

In light of the monumental task of implementing the TRO within the timeframe required by the FCC, the Commission found that the batch cut migration process issue should be considered

²A batch cut migration process is defined as a process by which the ILEC simultaneously migrates two or more loops from one carrier’s local circuit switch to another carrier’s local circuit switch, giving rise to operational and economic efficiencies not available when migrating loops from one carrier’s local circuit switch to another carrier’s local circuit switch on a line-by-line basis.

separately from the remainder of the TRO issues. Accordingly, on September 30, 2003, the Commission commenced this docket for purposes of addressing the batch cut migration process. The Commission directed all persons desiring to participate in this proceeding to file a notice of intent to participate in this docket by October 9, 2003. Such notices were filed by MCI WorldCom Communications, Inc., and Brooks Fiber Communications of Michigan, Inc. (MCI), Covad Communications Company (Covad), Sage Telecom, Inc. (Sage)³, LDMI Telecommunications, Inc. (LDMI), the Competitive Local Exchange Carriers Association of Michigan (CLECA), TDS Metrocom, LLC (TDS), XO Michigan, Inc. (XO), Talk America Inc. and Z-Tel Communications, Inc. (Talk/Z-Tel), Bullseye Telecom, Inc. and the Save American Free Enterprise in Telecommunications Coalition (Bullseye and Safe-T), Verizon North Inc. and Contel of the South, Inc., d/b/a Verizon North Systems (Verizon), SBC Michigan (SBC), AT&T Communications of Michigan, Inc. and TCG Detroit (AT&T), Quick Communications, Inc. (Quick), TelNet Worldwide, Inc. (TelNet), The Winn Telephony Company (Winn)⁴, Climax Telephone Company (Climax), Superior Spectrum, Inc. (Superior), CenturyTel of Michigan, Inc., CenturyTel Midwest-Michigan, Inc., CenturyTel of Northern Michigan, Inc., and CenturyTel of Upper Michigan, Inc. (collectively, CenturyTel), McLeodUSA Telecommunications Services, Inc. (McLeodUSA), CMC Telecom, Inc. (CMC), and Allegiance Telecom of Michigan, Inc. (Allegiance). The Commission Staff (Staff) also participated in the proceedings.

On October 13, 2003, Administrative Law Judge James N. Rigas (ALJ) presided over a prehearing conference attended by the parties who provided notice of intent to participate. The

³By letter dated April 6, 2004, Sage withdrew from further participation in this proceeding.

⁴By letter dated November 24, 2003, Winn withdrew from further participation in this proceeding.

ALJ set a schedule, which included three rounds of comments followed by cross-examination of witnesses. The remainder of the schedule was left open.

On January 8, 2004, a second prehearing conference was held to consider whether to address the issue of the batch cut migration costs in Case No. U-13531, SBC's pending total service long run incremental cost (TSLRIC) case, or in this proceeding. The ALJ determined that the batch cut migration cost issues should be addressed in Case No. U-13531, whereas the batch hot cut process should be resolved in Case No. U-13891.

On March 9, 2004, SBC filed a motion seeking to temporarily stay further proceedings in the wake of the March 2, 2004 decision of the U.S. Court of Appeals for the D.C. Circuit that several aspects of the FCC's TRO are unlawful, including the FCC's sub-delegation of certain impairment decisions to state commissions.⁵ By order issued on March 15, 2004, the Commission found that SBC's motion to temporarily stay this proceeding should be denied.

On March 24, 2004, the ALJ presided over a hearing wherein the parties stipulated that the witnesses and their exhibits should be received into evidence without the necessity of cross-examination. A total of 17 witnesses testified and 39 exhibits were received into evidence before the record was closed. The ALJ also provided for the filing of briefs and reply briefs by April 21 and May 10, 2004, respectively.⁶ Finally, the ALJ indicated that the preparation of a Proposal for Decision was not necessary because the Commission had agreed to read the record.

⁵See, United States Telecom Assn v FCC, ___ US App DC ___, 359 F3d 554 (2004) (USTA II).

⁶Briefs were filed by SBC, the Staff, TDS, Covad, MCI, and AT&T. Reply briefs were filed by SBC, the Staff, Covad, MCI, and AT&T.

1. Background

a. TRO Provisions

Section 51.319(d)(2)(ii) of the administrative rules promulgated by the FCC to address batch cut migration issues provides as follows:

In each of the markets that the state commission defines pursuant to paragraph (d)(2)(i) of this section, the state commission shall either establish an incumbent LEC batch cut process as set forth in paragraph (d)(2)(ii)(A) of this section or issue detailed findings explaining why such a batch process is unnecessary, as set forth in paragraph (d)(2)(ii)(B) of this section. A batch cut process is defined as a process by which the incumbent LEC simultaneously migrates two or more loops from one carrier's local circuit switch to another carrier's local circuit switch, giving rise to operational and economic efficiencies not available when migrating loops from one carrier's local circuit switch to another carrier's local circuit switch on a line-by-line basis.

(A) A state commission shall establish an incumbent LEC batch cut process for use in migrating lines served by one carrier's local circuit switch to lines served by another carrier's local circuit switch in each of the markets the state commission has defined pursuant to paragraph (d)(2)(i) of this section. In establishing the incumbent LEC batch cut process:

(1) A state commission shall first determine the appropriate volume of loops that should be included in the "batch."

(2) A state commission shall adopt specific processes to be employed when performing a batch cut, taking into account the incumbent LEC's particular network design and cut over practices.

(3) A state commission shall evaluate whether the incumbent LEC is capable of migrating multiple lines served using unbundled local circuit switching to switches operated by a carrier other than the incumbent LEC for any requesting telecommunications carrier in a timely manner, and may require that incumbent LECs comply with an average completion interval metric for provision of high volumes of loops.

(4) A state commission shall adopt rates for the batch cut activities it approves in accordance with the Commission's pricing rules for unbundled network elements. These rates shall reflect the efficiencies associated with batched migration of loops to a requesting telecommunications carrier's switch, either through a reduced per-line rate or through volume discounts as appropriate.

(B) If a state commission concludes that the absence of a batch cut migration process is not impairing requesting telecommunications carriers' ability to serve end users using DS0 loops in the mass market without access to local circuit switching on an unbundled basis, that conclusion will render the creation of such a process unnecessary. In such cases, the state commission shall issue detailed findings regarding the volume of unbundled loop migrations that could be expected if requesting telecommunications carriers were no longer entitled to local circuit

switching on an unbundled basis, the ability of the incumbent LEC to meet that demand in a timely and efficient manner using its existing hot cut process, and the non-recurring costs associated with that hot cut process. The state commission further shall explain why these findings indicate that the absence of a batch cut process does not give rise to impairment in the market at issue.

b. SBC's Current Hot Cut Processes

SBC contends that its current hot cut options are likely more than adequate to meet current and future demands. SBC explains that when a mass market customer changes from local exchange service provided by SBC to local exchange service provided by a competing carrier, the connection between the customer's loop and SBC's switch must be physically disengaged and a new connection must be established between the customer's loop and the CLEC's switch. This work is ordinarily performed while the customer's line is in active service or "hot." To make the new connection, the customer's loop is "cut" while it is "hot," which precipitates a short-term outage. Accordingly, the term "hot cut" refers to the process by which the ILEC technician manually disconnects a customer's loop and manually reconnects the loop to the CLEC's switch while simultaneously reassigning the customer's original phone number from the ILEC's switch to the CLEC's switch. TRO ¶ 465 n. 1409.

Subject to two exceptions, SBC has the ability to hot cut any copper DS0 loop within the corresponding central office that houses the loop. However, if the customer is served by an Integrated Digital Loop Carrier (IDLC) system or an Integrated Subscriber Loop Carrier (ISLC) system, then a technician must move the existing fiber facilities to a copper or universal digital loop carrier (UDLC) loop in the field.

SBC currently offers both Frame Due Time (FDT) and Coordinated Hot Cut (CHC) methodologies for non-IDLC loops. The physical steps of both systems are similar; the costs are different. FDT projects are less expensive because they involve fewer resources and less

coordination between SBC and the requesting CLEC. The main difference between the two methods is that with a CHC project, SBC and CLEC personnel communicate with each other on the day of the hot cut, whereas on an FDT project, each carrier's personnel perform their individual functions during a pre-set time frame without interaction.

Both FDT and CHC cutovers may currently be scheduled on a "project" basis, which allows for more than 24 lines that terminate at the same end-user address to be switched. For FDT projects, the CLEC can schedule the cutover during normal business hours at a time negotiated by the parties. For CHC projects, the cutover can be scheduled during normal business hours, off-hours, or Saturdays.

c. SBC's Batch Cut Migration Proposal

SBC urges the Commission to approve its proposed batch cut migration process without modifications. SBC's batch cut migration process proposal is attached to the testimony of Carol A. Chapman, an Associate Director – Local Interconnection Services for SBC, as Exhibit A-13. It consists of a batch cut migration process overview with flow charts, a detailed process description, an incremental hot cut demand analysis, an overview of operational support system (OSS) changes associated with SBC's proposal, and a recommendation to enable CLECs to obtain "real time" hot cut completion notification. SBC proposes three new hot cut options: the Enhanced Daily Process (EDP), the Defined Batch Process (DBP), and the Bulk Project Offering (BPO).

According to SBC, the EDP is designed to support a CLEC's acquisition of *new* customers that the CLEC will serve through use of SBC's UNE loop and the CLEC's or a third party provider's switch. SBC states that the provisioning interval for the EDP will be 3 to 5 days. SBC placed no limit on the number of orders a CLEC may submit.

SBC explains that the primary purpose of the DBP is to allow CLECs to transition their *embedded base* of UNE-P customers to the CLEC's or a third party's switches. Because embedded customers are presumably more indifferent to the timing of the cutover than are new customers, SBC proposes a longer, 13-day provisioning interval.⁷ Also, SBC places a limit of 100 cutovers per CLEC per central office per day as well as a maximum limit of 200 cutovers per central office per day.

SBC also proposes the BPO to handle the scheduling of large volumes of hot cuts. For the BPO, the provisioning interval will be subject to negotiations and the size limit will require projects involving 20 or more lines per customer.

2. Positions of the Other Parties

a. TDS

As a facilities-based provider with over 62,000 customers in Michigan, TDS maintains that it currently relies on SBC's existing FDT and CHC processes. TDS reports that it routinely orders cutovers for one or two loops per wire center. While supportive of the creation of an efficient larger-volume batch cut mitigation process, TDS is more interested in ensuring that SBC's existing FDT and CHC processes remain in place without any degradation in service or any increase in cost. TDS states that in Exhibit I-39, which sets forth SBC's response to a data request, SBC anticipated that its current FDT and CHC processes would remain available to all CLECs and that the current pricing of those services would remain unchanged until the Commission decides Case No. U-13531, SBC's pending cost case. TDS urges the Commission to require SBC to fulfill obligations under the current processes without degrading provisioning intervals, time-of-day

⁷SBC maintains that it needs a 13-day provisioning interval to accommodate the scheduling of work assignments in accordance with the terms of its labor contracts.

reservation flexibility for CHC conversions, due date minus two pre-wiring/testing capability, and cost predictability. Additionally, TDS states that the Commission should make it clear that the proposed batch hot cut limitation of 200 cutovers per central office per day will not delay or degrade the current CHC/FDT processes for small volumes of orders.

TDS also asserts that Case No. U-13531 should be the forum where any potential revisions to the current hot cut rates are addressed. In addition, TDS argues that the terms of each CLEC's interconnection agreement should be determinative with regard to the timing and manner in which new hot cut rate revisions become effective. In the interim, TDS insists that the current CHC/FDT hot cut rates remain unchanged, subject to any Commission-ordered discounts adopted in this proceeding. TDS is also concerned about the potential for SBC to seek cost recovery for incremental costs it projects as a result of creating a batch hot cut process in Michigan. TDS maintains that current users of CHC/FDT processes should not be required to pay for the cost of implementing a batch hot cut process that they will not need. Rather, TDS states that such costs should be recovered directly through the rates SBC charges CLECs ordering batch hot cuts and should not be spread over all hot cut rates.

b. Covad

Covad insists that the future of residential telecommunications competition in the Michigan mass market hinges upon the ability of competitors to offer bundled voice and data products in competition with the bundled voice and data products offered by SBC. According to Covad, to provide mass market customers with a bundled voice and data product, two CLECs generally

engage in an arrangement known as line splitting.⁸ Covad maintains that, if local circuit switching is eliminated as a UNE, then CLECs need a batch hot cut process that allows CLECs to migrate their embedded base of customers with a voice and data bundle using ILEC switching to a voice and data bundle with CLEC switching.

Covad states that SBC has refused to develop a batch hot cut process to migrate voice plus data loops from ILEC-switching arrangements to CLEC-switching arrangements. According to Covad, absent such a process, there will be no means for CLECs to migrate their embedded base of customers obtaining a voice and data bundle. Therefore, argues Covad, SBC's development of a batch hot cut process is an essential predicate to ensuring that Michigan consumers receive the benefits of competition in the growing market for bundled voice and data products. For this reason, Covad contends that unless the Commission approves an adequate batch hot cut process for voice plus data loops, CLECs will remain impaired without access to unbundled local circuit switching for line splitting arrangements for their embedded base of customers.

Covad stresses that a California administrative law judge has agreed with its position that the TRO requires ILECs to include voice plus data loops in their proposed batch cut migration processes. Likewise, Covad quotes extensively from a transcript of the California proceeding to demonstrate why SBC's position is inconsistent with the TRO. Moreover, Covad insists that voice plus data loop migrations involve batch cut migration processes and that SBC should therefore be required to perform them in the most efficient manner, even if it involves a cross-connection of two CLEC collocation spaces with a jumper on the applicable SBC distribution frame.

⁸Covad explains that in most line splitting arrangements the voice CLEC provides the voice service using unbundled local circuit switching, and the data CLEC provides the data service using its own packet switching network.

Covad argues that requiring CLECs to provision cage-to-cage cross-connects is inefficient and discriminatory. According to Covad, cage-to-cage cross-connects are time consuming, expensive, and result in stranded network capacity. In addition, Covad states that requiring CLECs to provision cage-to-cage cross connects does not allow collocators to use the existing network in as efficient a manner as the incumbent uses it for its own purposes. Specifically, Covad maintains that when SBC and Covad provide an end-user with a voice and data bundle of services, SBC will cross-connect the voice portion of the loop from the splitter to the applicable SBC distribution frame before cross connecting the voice portion of the loop to the SBC switch. However, when AT&T and Covad provide an end-user with a voice and data bundle of services, SBC will not cross-connect the voice portion of the loop from the splitter to the AT&T switch presence. Covad insists that this amounts to discriminatory treatment.

Again, citing the California administrative law judge, Covad argues that the Commission should not address the line splitting issues it seeks to litigate in a collaborative process. According to Covad, a batch cut migration process for voice plus data loops must be approved in this nine month proceeding and should address all of the following matters: pre-ordering, ordering, provisioning, maintenance, costing/pricing, and verification.

Finally, according to Covad, because SBC has not presented any credible evidence that it can process voice plus data loop hot cuts at any volume, much less the volumes that would likely occur if the Commission allows SBC to cease providing UNE switching in areas of Michigan, the Commission must provide for some form of validation of SBC's batch cut migration processes to ensure that SBC is capable of migrating customers from line splitting with ILEC switching to line splitting over CLEC switching in a timely manner. Covad insists that SBC must fully document the processes and make the documentation available to the Commission and parties well in

advance of the implementation date. According to Covad, SBC's processes also must be tested at forward looking commercial churn volumes and subject to performance measurements for these processes and a remedy plan.

c. MCI

MCI argues that SBC's inability to move high volumes of CLEC mass-market customer loops from its switches to CLEC switches is a major problem. According to MCI, the presence of a CLEC switch in a given geographic market will be irrelevant because, if CLECs cannot reliably use their deployed switches to serve mass-market customers, then it is extremely unlikely that CLECs will self-deploy any further.

MCI maintains that the improved hot cut process envisioned by the FCC must support migrations of all customer services on the loop, including both voice and data, and must support migrations from any carrier to any other. MCI insists that the FCC explicitly noted the need for seamless and timely migrations to and from the facilities of other competitive carriers. However, MCI contends that SBC has proposed only modest improvements and has left untouched highly manual and inefficient hot cut processes. MCI insists that SBC's proposed manual batch cut migration processes will be overwhelmed by the volume of hot cuts that would arise if CLECs lose access to UNE switching. Further, contends MCI, the evidence shows that SBC's proposals fail to address a host of other operational issues arising during the complex series of steps involved in the end-to-end hot cut process, from pre-ordering to ordering, provisioning, and order completion in several ILEC or industry databases.

MCI urges the Commission to establish a robust, comprehensive set of performance measures, which are subject to penalties, prior to any decision to remove CLEC access to UNE switching.

According to MCI, such performance measures are the only means to judge the performance of SBC's batch cut migration processes.

d. AT&T

AT&T argues that SBC's proposed batch cut migration processes fail to meet the FCC's requirements and do not cure the significant impairment faced by CLECs for unbundled local switching. Therefore, AT&T urges the Commission to reject SBC's proposals and implement the specific recommendations offered by AT&T in this proceeding. AT&T also asserts that the Commission need not decide whether the batch cut migration process approved in this proceeding eliminates CLEC impairment because that issue has not been contested and is incapable of resolution before testing and implementation.

AT&T comments that the batch cut migration process will be of minimal assistance in dealing with new customer acquisitions, which occur one-by-one, in undefined and unpredictable patterns. AT&T is also concerned with the 13 business-day interval for provisioning loops designated with a batch, which it maintains is inconsistent with current customer expectations. Further, AT&T claims that SBC's proposal fails to account for customers that have digital subscriber line (DSL) through line splitting or line sharing, customers that are migrated from CLEC to CLEC, and customers that CLECs desire to serve via enhanced extended links (EELs).

AT&T insists that SBC's pricing, metrics, and testing proposals are flawed and incomplete. For example, AT&T insists that all right-thinking persons would expect that any nonrecurring charge associated with a batch cut would be lower than the current Commission-approved nonrecurring charge for an individual unbundled loop. Despite this reasonable expectation, AT&T points out that SBC has proposed much higher batch cut migration process charges.

AT&T contends that certain matters, such as performance measurements, should be delegated to a collaborative. The specific tasks listed by AT&T include developing specific metrics to measure SBC's performance in these areas, setting performance standards in these areas, and determining the penalties that should be imposed whenever SBC fails to meet these standards. Pages 23 to 25 of AT&T's brief set forth specific recommendations that it urges the Commission to adopt for batch cut migration process performance metrics.

AT&T also states that the Commission should not approve a new batch cut migration process without moving simultaneously to require implementation of metrics and penalties as a condition for approval of the process. According to AT&T, the Commission should require stringent hot cut and batch hot cut metrics and very substantial remedies as a condition of its approval of a batch hot cut process. While the details can be delegated to a collaborative, AT&T insists that the threshold issue of whether there should be expanded hot cut and batch hot cut metrics as part of an acceptable process should be settled at this time.

With regard to testing issues, AT&T stresses that SBC has yet to experience anything even close to the hot cut volumes that would be entailed in such a process. For that reason, AT&T maintains that the Commission should require SBC to submit a proposed test plan that: (1) uses live lines, (2) tests hot cut volumes identified by SBC in its filings in this case (both for the migrations and for new customer acquisitions), (3) includes numerous central offices throughout the state, (4) provides CLECs with the ability to monitor the test and review the results in real-time, (5) identifies a third-party administrator agreed to by the parties, and (6) is subject to Commission review and public comment.

e. Commission Staff

In its brief, the Staff states that it participated in collaborative meetings on the batch cut migration process issue with SBC, the CLECs, and other state regulatory staffs. The Staff indicates that the collaboratives were useful and brought about modifications to SBC's original proposal. However, the Staff would like to see the progress made in these meetings continue by having the parties incorporate the issues and concerns highlighted by the Staff in its brief into the proposed batch cut migration process. These topics include issues related to costs/pricing, testing, OSS, performance measures, IDLC, line sharing/line splitting, CLEC-to-CLEC migrations, EEL migrations, provisioning intervals, mechanization, and retention of existing processes. Until a final batch cut migration process is approved by this Commission, the Staff believes that CLECS are impaired and that UNE-P should remain available for CLECs to use to provision customers.

Most critical in the Staff's opinion is the issue of testing. According to the Staff, without adequate testing, the parties cannot evaluate whether SBC is capable of migrating multiple lines in a timely manner. The Staff believes that only after appropriate testing of the proposed process occurs, modifications are made to make this process more mechanized, and adoption of performance measures and new OSS standards, will the Commission be able to effectively evaluate and approve a batch cut migration process.

The Staff recommends a three-phase batch cut migration process development approach, which calls for SBC and CLECs to develop and submit a joint proposal for a plan to test and revise the current SBC proposal as set forth in the Staff's brief. Specifically, the Staff supports the following procedures:

Phase I: OSS and PMs should be addressed in the PM and OSS dockets. Interested parties would submit a joint test plan to the Commission. Testing of initial proposals would take place and necessary adjustments would be incorporated.

Phase II: The inclusion of IDLC and line-splitting scenarios in the batch cut migration process would be considered. The existing line splitting collaboratives in Case No. U-12320 would be continued.

Phase III: The parties would address and find solutions to the CLEC-to-CLEC and FFI migration issues, which would then be incorporated into the batch cut migration process.

3. Discussion

a. Motion to Dismiss

On June 18, 2004, SBC filed a motion to dismiss this proceeding and Case No. U-13796, the TRO proceeding. In so doing, SBC maintained that Michigan law limits the Commission's jurisdiction over federal telecommunications laws, rules, orders, and regulations to matters that have been *lawfully* delegated to the states. MCL 484.2201(1). SBC contended that on June 16, 2004 as a result of USTA II, the Court of Appeals for the District of Columbia issued its mandate to the FCC formally vacating the FCC's rules concerning mass market switching, high-capacity loops, and dedicated transport. According to SBC, the basis for the Court's ruling was that the FCC unlawfully subdelegated its responsibilities under Section 251(d)(2) of the federal Telecommunications Act of 1996, Pub L 104-104, 110 Stat 56, codified at 47 USC 151 et seq. (FTA), to state commissions to develop a batch cut migration process. Specifically, SBC insists that the Commission instituted Case No. U-13891 exclusively on authority delegated to it by the FCC by the TRO. Further, SBC asserts that the FCC's batch cut rules were predicated on, and

intrinsically tied to, the FCC's attempted sub-delegation of authority to state commissions to make market-by-market impairment decisions, which was determined to be unlawful by the D.C. Circuit in USTA II. SBC also maintained that the FCC's batch cut rules were premised on the FCC's blanket, nationwide finding of impairment with respect to mass market switching, which was likewise rejected by the D.C. Circuit. According to SBC, the Commission cannot lawfully regulate inter-carrier relations with respect to matters that are subject to Section 251 of the FTA, except as provided by Congress. As applied here, SBC argued, the Commission is precluded from exercising the authority delegated to it by the FCC to review and approve batch cut processes set forth in Section 251. Moreover, SBC insisted that the Commission may only lawfully review a batch cut process in an arbitration proceeding conducted pursuant to Section 252 of the FTA.

Responses to the motion to dismiss were filed by MCImetro Access Transmission Services LLC (MCImetro) and AT&T Communications of Michigan and TCG Detroit (AT&T). MCImetro and AT&T argue that the Commission's March 15, 2004 order properly found that the Commission had an independent basis to continue this proceeding under state law. Moreover, they insist that the process of compiling the record is now complete and that it would be waste of resources to simply close the docket at this juncture.

The Commission finds that SBC's motion to dismiss should be rejected. An examination of USTA II does not support SBC's position that the Commission must immediately terminate this proceeding. The focus of the Court's concerns in USTA II was on the finding of impairment and on the FCC's sub-delegation to the Commission of the responsibility to determine on a more granular approach whether, in a particular market, there is evidence of non-impairment amongst competing carriers without access to unbundled switching. USTA II, slip opinion, p. 22. As summarized by the Court:

We vacate the Commission's subdelegation to state commissions of decision-making authority over impairment determinations, which in the context of this Order applies to the subdelegation scheme ... (Emphasis added).

Because Section 51.319(d)(2)(ii) of the FFC's rules does not delegate to state commissions decision-making authority for impairment determinations and was therefore not vacated, the Commission is required to establish a batch hot cut migration process even if the FCC later makes its own impairment determinations. Moreover, the Commission has jurisdiction pursuant to the Michigan Telecommunications Act (MTA), 1991 PA 179, as amended, MCL 484.2101 et seq., to ensure that a healthy, vibrant competitive market for local exchange service exists in Michigan. In Section 305 of the MTA, the Legislature has prohibited numerous forms of discriminatory behavior. Section 305 also prohibits specific activities that degrade or impair the quality of service offerings of other providers.

Finally, the Commission is persuaded that acceptance of SBC's position would place the telecommunications industry in jeopardy of facing a new regulatory paradigm that is expected to result in unprecedented numbers of customer migrations without the means to accomplish the migrations in a timely manner. CLECs that currently provide service to customers through use of UNE-P will need to transition those customers to the CLEC's own switches. Indeed, SBC readily conceded that "[i]n geographic markets where the Commission finds that CLECs are not impaired without access to unbundled switching, hot cut volumes may increase significantly." SBC brief, p. 19. With 1.2 million Michigan customers served via UNE-P as of September 2003, the availability of a reliable, cost-efficient batch cut migration process is both necessary and in the public interest. AT&T suggested that the absence of a workable batch cut migration process "could result in tens of thousands of Michigan customers being left without service, thereby irreversibly tarnishing the reputation of the entire CLEC community." AT&T brief, p. 22. In the

Commission's viewpoint, it would be a waste of effort and extremely detrimental to the interests of ILECs, CLECs, and their customers, and contrary to the intent of federal and state law to foster local competition for the Commission to simply abandon this proceeding at this time. Therefore, the Commission finds that SBC's motion to dismiss should be rejected.

b. Implementation of a Temporary Batch Cut Migration Process

The FCC identified several deficiencies with existing hot cut processes. According to the FCC, the non-recurring charges are too high, customers have their services disrupted in a manner that negatively affects customer perceptions of CLEC service quality, provisioning delays often prevent CLECs from meeting customer expectations, and the volume of hot cuts that ILECs can currently handle is substantially inadequate compared to the volume necessary to migrate customers between carriers. The FCC also specifically found that hot cut processes should include not only the ability to handle migrations from the ILEC to the CLEC, but from any carrier to another. The Commission was given 9 months, or until July 2, 2004 to resolve these concerns.

SBC asserts that its proposals for batch hot cuts fully address the deficiencies identified by the FCC. The Staff, Covad, AT&T, and MCI disagree and urge the Commission to adopt significant modifications to the proposals proffered by SBC. TDS is less concerned with implementation of a new batch cut process than it is with preservation of SBC's existing alternatives.

Given the fluidity of the current regulatory climate, impending changes that may precipitate significant volumes of customer migrations, and the need to complete this proceeding in a timely manner, the Commission is persuaded that its initial regulatory response to the situation calls for approval of a batch cut migration process on a temporary basis while giving the parties most interested in the outcome of the issues more time to work out their differences in a forum that features mutual cooperation, not litigation. The Commission has successfully used the

collaborative process in several other situations, most notably in Case No. U-12320, which concerned SBC's compliance with the competitive checklist in Section 271 of the FTA,⁹ and in Case No. U-11830, which concerned the establishment of performance measurements for Ameritech Michigan.

With regard to the interim batch cut migration process, the Commission notes that SBC has agreed to maintain its existing hot cut offerings at their existing prices, terms, and conditions. Providers such as TDS that deal in lower volume switches of customers need these services and should not have access to them disrupted or revised at this time.

The FCC indicated that the Commission should first establish the appropriate volume of loops that should be included in the "batch." In so doing, the Commission adopts SBC's proposal for including 100 loops in the batch, which was detailed in the testimony of SBC witness Chapman. The Commission is persuaded that this batch size is reasonable and appropriate for interim purposes.

The FCC then instructed the Commission to consider specific processes to be employed when performing a batch cut, taking into account the ILEC's particular network design and cut over practices. For the purposes of this order, the Commission adopts SBC's proposals on an interim basis, subject to one exception. While the Commission agrees with the Staff and the CLECs that SBC's proposals need revision, the Commission finds that the revisions should be determined through a collaborative process, not a litigious one. The final batch cut procedures will be approved by the Commission after the parties have collaborated on the modifications to include the migration scenarios as outlined in the Staff's brief. At that point, the Commission will determine the costs/prices that will be approved for the final batch cut procedures.

⁹See, the February 9, 2000 order in Case No. U-12320.

The one exception to adoption of SBC's proposal involves the Staff's recommendation that the provisioning interval proposed by SBC should be revised for migrating customers via SBC's proposed DBP process. The proposed provisioning interval for the DBP service would have been at least 13 business days under SBC's proposal. The CLECs contended that this interval is too long and should be comparable with the two to three business day interval used to cut over a UNE-P customer. The CLECs claim that they will be harmed if the batch cut migration to UNE-L does not match the interval for UNE-P migration. An examination of Rule 58 of the Commission's Telecommunications Quality Service Rules, R 484.458, clearly indicates that SBC's adherence to a 13 business day provisioning interval would be problematic.¹⁰ The Commission finds that SBC should modify its proposal so as to comply with the requirements of R 484.458.

The rates for batch cuts will not be developed in this proceeding as the issue of costs/prices was deferred to the SBC TSLRIC cost proceeding in Case No. U-13531. For interim purposes, SBC's existing rates for individual hot cuts will be adopted, subject to possible refund after resolution of Case No. U-13531. This means, for example, if SBC performs a 100-loop batch cut, the charge for that service would be the individual hot cut rate for a loop connection multiplied by 100 plus a single standard service order charge. If the Commission determines in Case No. U-13531 that a lower rate is appropriate, then SBC will refund the difference. In so doing, the Commission specifically rejects interim use of SBC's proposed rates because they have not been sufficiently scrutinized to justify their use at this time.

¹⁰Rule 58 (1) obligates a provider to routinely install service for a residential or small business customer or applicant within a monthly average of 5 business days of the installation request, or a monthly average of 10 business days after a customer is released for a migration. Rule 58(2) provides that, for basic local exchange service, a provider shall release the loop facilities and telephone number serving its customer within a monthly average of 5 business days after a request is made by a customer or on behalf of a customer to change local service providers.

Finally, the Commission directs the Staff to convene collaborative discussions involving all interested parties to address all issues left unresolved by this order. To the extent that specific issues may be appropriately addressed in the context of an existing collaborative, the parties are free to do so.

The Commission specifically directs the parties to address the following areas of concern to achieve modifications: IDLC migrations, line sharing/line splitting migrations, CLEC to CLEC migrations, and EEL migrations. These modifications should be made after collaborative efforts among SBC, the CLECs, and the Staff to accommodate the CLEC's and the Staff's concerns. The Commission also advocates an industry collaborative effort to address the issues of operational and economic efficiencies that can be achieved through a more mechanized and less manual process for performing batch hot cuts.

The Commission is also persuaded that there must be appropriate procedures for testing of the SBC modified process to make sure the batch cut migration processes will work as anticipated in a real environment. Without adequate testing, the parties and the Commission cannot evaluate whether SBC is capable of migrating multiple lines in a timely manner. SBC, the CLECs, and the Staff shall submit a joint plan to the Commission regarding testing within six weeks of the date of this order that is modeled after SBC's managed introduction plan. The plan shall be posted on the company's and the Commission's websites and served by SBC on all CLECs licensed to serve customers in Michigan. Any person having a comment or objection to the plan shall have two weeks to file comments in this proceeding. Testing should begin as soon as possible, and should include real world examples of batch cut migrations performed by SBC. In a future order in this proceeding, the Commission will address proposals for the length of the test program and the standards by which the results of the testing program will be evaluated.

After SBC's batch cut migration process proposal is modified as outlined in the Commission order, OSS modifications shall be made and related performance measures shall be developed collaboratively by the parties.

The parties are directed to work as expeditiously as possible to bring this proceeding to a close. It is the Commission's goal to have all outstanding issues resolved by July 1, 2005.

The Commission FINDS that:

- a. Jurisdiction is pursuant to 1991 PA 179, as amended, MCL 484.2101 et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; the Commission's Rules of Practice and Procedure, as amended, 1999 AC, R 460.17101 et seq.; and 47 USC 251 and 252.
- b. The batch cut migration processes described in this order should be approved on an interim basis.
- c. Interested parties should be directed to engage in collaborative discussions to reach agreements regarding the content and testing procedures for a final batch cut migration process.

THEREFORE, IT IS ORDERED that:

- A. The batch cut migration processes described in this order are approved on an interim basis.
- B. Interested parties are directed to engage in collaborative discussions to reach agreements regarding the modifications required by this order. Within two weeks of the date of this order, the Commission Staff shall convene the initial collaborative discussions required by this order.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ J. Peter Lark

Chair

(S E A L)

/s/ Robert B. Nelson

Commissioner

/s/ Laura Chappelle

Commissioner

By its action of June 29, 2004.

/s/ Mary Jo Kunkle

Its Executive Secretary